1978

State of Utah v. James M. Gray : Brief of Appellant

Utah Supreme Court

IN THE

SUPREME COURT OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- JAMES M. GRAY, Defendant-Appellant.	Case No. 15550

BRIEF OF APPELLANT

Appeal from the judgment of the [illegible] District Court, State of Utah, the [illegible] Allan B. Sorensen, Judge.

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TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes Cited

IN THE

SUPREME COURT OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	Case No. 15550
-vs-	)	
	)	
JAMES M. GRAY,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case was a criminal action brought by the State of Utah against defendant-appellant James M. Gray charging him with burgularly, a felony in the second degree, in violation of the Section 76-6-202 Utah Code Annotated, 1953 as amended.

DISPOSITION IN LOWER COURT

In the District Court of the Fourth Judicial District, Uinta County, Utah on November 1, 1977 the jury found appellant guilty of burgulary as charged. Subsequently appellant was sent to the Utah State Prison for a term of

one to fifteen years as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court reversing his conviction and quashing the information herein, or in the alternative, remanding the case to the Fourth Judicial District Court for a new trial consistent with the rulings of this Court.

STATEMENT OF THE FACTS

The evidence discloses that a burgularly occured on the 18th of September, 1977 in Uinta County, State of Utah, that the defendant was periodically in the company of the perpetrator of the burgularly and that the defendant may have aided the principal in the perpetration or by selling one item obtained in the burgularly. Further, that the defendant was intoxicated during the day and evening in question.

ARGUMENT

I. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In his opening statement defense counsel stated to the jury that he was"appointed"counsel for the defendant and that he expected the evidence to show "That there will be no evidence that the defendant here, Mr. Gray, ever entered the premises that was supposed to have alleged to

be burlarized"(T.5). Counsel also stated that "...we will introduce testimony from one of the parties that was supposed to have been charged in this same action that he didn't in fact--didn't commit the burgulary." (T.6) Apparently defense counsel was totally ignorant of the aiding and abetting statute (76-2-202 U.C.A. 1953 as amended) since defense counsel in his opening argument stated that "... he might have dealt in some of the or handled some of the items as to the burgularly..." (T.5) and in his motion at the close of the State's evidence moved to dismiss on the grounds that the defendant was not charged with having possession of property that was recently stolen and that the evidence failed to disclose any breaking and entering. As defense counsel stated in his motion "There might have been other crimes, but he is not charged with having possession of property that is recently stolen. I mean he is charged with the breaking and entering." (T.56-57).

In addition to revealing defendant's impecuniosity to the jury in his opening statement (T.5) counsel allowed witnesses to disclose to the jury that an agent from Adult Probation and Parole was involved in dealings with the defendant. See for example (T.7,8,12 and 27-28). Not only was that disclosure made but also the fact that the agent from Adult Probation and Parole had known defendant

for ten years (T.28) and that defendant had been incarcerated in the Utah State Prison (T.54). All such disclosures were made without objection by counsel and without cautionary instructions to the jury.

The record further discloses that the trial counsel failed to take even the rudimentary step of excluding the witnesses during the trial. See e.g. (T.22,28,40, 46,62 and 70).

Counsel further failed to properly investigate the case as evidenced by the fact that he asked witness Ziegler how long he had known the defendant Gray and where he had met him, thereby eliciting otherwise inadmissible testimony most detrimental to his client. A reasonable investigation would have disclosed that defendant Gray was in prison at that time with the witness. This lack of investigation or sheer incompetency is further evidenced by defense counsel's failure to question witness Ziegler relative to any promises or inducements made by the prosecutor or any follow-up of Mr. Ziegler's prior felony conviction, notwithstanding that Ronald Ziegler was a crucial witness.

The record is replete with hearsay statements and other objectionable evidence to which defense counsel failed to make any objections or have stricken. Defense counsel did not request precautionary instructions appar-

ently because he did not realize the evidence was objectionable. The cumulative effect of this failure to object and/or strike testimony is further compounded by the fact that closing arguments were not recorded or included in the transcript, resulting, at best, in pure conjecture as to the use made of objectionable evidence in closing arguments.

This Court has reviewed numerous attempts to overturn convictions on the grounds that the defendant was deprived effective assistance of counsel. For example, as recently as July 26, 1978 in State v. Pierren, Consolidated cases No. 14912, 15108, 15109, and 15114, the Court reiterated the long standing rule applicable to such cases:

> "to show inadequate or ineffective counsel, the record must establish that counsel was ignorant of the facts or the law, resulting in withdrawal of a crucial defense, reducing the trial to a "farce and a sham"." Citing State v. McNichol, 554 P.2d 203 (Utah, 1976).

That standard was further explained in State v. McNichol, supra, in which the Court stated:

> "he is entitled to the assistence of a competant member of the Bar, who shows a willingness to identify himself with the interests of the accused and presents such defenses as are available under the law and consistent with the ethics of the professions." Id. at 204.

Naturally, the defendant must be able to show that his claim of ineffective assistance of counsel was a

demonstrable reality and not a speculative matter. Further, trial strategy must be differentiated from failures to investigate or effectively represent clients. As stated in People v. Martinez, 14 Cal.3d 533, 121 Cal.Rptr. 611, 535 P.2d 739 (1975):

> "The cases involving a failure to make factual and legal inquiries and investigations necessary to a constitutionally adequate defense are to be distinquinshed, of course, from cases wherein counsel, having made such inquiries and investigations makes tactical or strategic decisions..." 535 P.2d at 742.

The record in this case clearly shows that defense counsel was ignorant of both the facts and the law. Time after time hearsay, non-responsive answers, or evidence without foundation was admitted without objection and without motions to strike. Naturally enough not all hearsay statements or non-responsive answers are claimed to prejudicial, however, a review of the entire record leads to the inescapable conclusion that due to defense counsel's inability to control the admission of hearsay and non-responsive testimony, defendant Gray was deprived a fair trial. For example, Officer Downer testified as to Mr. Stanley's identification of certain items of evidence (T. 11,12, 13 and 14), statements made by Mr. Butters with respect to Mr. Gray (T.14) and the hardship that the victim underwent (T.13). Defense counsel further compounded the

error with the first witness when he elicited testimony from Officer Downer that Mr. Butters stated that both Butters and Gray had been behind the wheel of the pickup truck the night in question (T.19).

Defense counsel followed the same pattern with the second witness, Officer Lance. During that testimony defense counsel elicited several damaging non-responsive answers concerning defendant's association with witness Butter's without seeking the Court's assistance in having the witness respond to the question or having the answers stricken. See (T.26). Defense counsel also permitted substantial testimony concerning a search which was totally irrelevant to the case inasmuch as none of the items obtained in the search were offered as evidence, See (T.29).

The list could go on and on with respect to the subsequent witnesses and counsel's failure to object to hearsay, non-responsive answers or lack of foundation. See for example (T.53).

Counsel's further failure to understand the law of aiding and abetting is made abundantly clear in his motion to dismiss (T.56-58) and in his opening statement (T.5). Although the jury was instructed on the law of aiding and abetting, counsel apparently believed that the lack of entry by his client was valid defense.

Defense counsel was further remiss by failing to exclude witnesses, a must rudimentary tactical decision, that evinces more a lack of awareness than an informed trial decision.

The record exudes defense counsel's inability to control the trial procedure or to confine it to the most rudimentary parameters of the Rules of Evidence thereby depriving him of any opportunity to reasonable assert defendants lack of knowledge concerning the stolen items, lack of intent to aid or abet,or that an alternative reasonable hypothesis existed in explanation of the defendant's actions. This trial was in fact, "a farce and a sham" and devoid of "these careful, factual and legal inquiries and investigations necessary to a constitutionally adequate defense." People v. Martinez, supra, at 742. Careful legal inquiry would have indicated to defense counsel any possible complicity as an aider and abetter as any factual inquiry would have disclosed to counsel that Ronald Ziegler had known the defendant-appellant while they were in prison. Instead, the trial record evinces questioning by defense counsel more analogous and attuned to preliminary hearings than trials. As a trial it was a farce and a sham.

II. ADMISSION OF EVIDENCE TENDING TO SHOW DEFENDANTS PRIOR CONVICTION, PRISON SENTENCE AND RELATIONSHIP TO ADULT PROBATION AND PAROLE CONSTITUTES PREJUDICIAL

ERROR.

During the State's case in chief references to defendant's prior conviction(s) and prison sentence thereon were alluded to in direct examination or cross-examination of State witnesses (T.54). The jury also was informed that an Adult Probation and Parole agent had known defendant for ten years, (T.27-28) and that the agent was involved in the investigation (T.8, 12).

Pursuant to statute, e.g. 78-24-9 U.C.A. (1953 as amended), and case law a defendant and witness may be asked whether or not he has ever been convicted of a felony. Such is a proper scope of inquiry into a testifying person's credibility. See for example State v. Crawford, 60 Utah 6, 206 P. 717 and State v. Dickson, 12 U.2d 8, 361 P.2d 412 (1961).

Notwithstanding the general principal as to testifying witnesses, when information is elicited from witnesses tending to show that the defendant has a propensity to commit crimes or to degrade the defendant, such is prejudicial error unless the appellate court can conclude that a different result would not have been obtained.

In State v. Kazda, 14 U.2d 266, 382 P.2d 407 (1963) the prosecutor elicited testimony concerning a conversation the defendant had with an FBI agent in which the agent implicated the defendant in other crimes for which the defendant had not been convicted. The Court held such

constituted prejudicial error, holding as follows:

> "We deem the foregoing to constitute prejudicial error. It implied that the defendant was implicated in other crimes, none of them proven, and could have no other effect than to degrade the defendant and give the jury the impression that he had a propensity for crime." 382 P.2d at 409.

Similarly, allegations of crimes subsequent to the alleged crime for which the defendant is being tried, absent admissibility under Rule 55, Utah Rules of Evidence, constitute prejudicial error. See State v. Dickson, 12 U.2d 8, 361 P.2d 417 (1961), in which the Court reiterated the well established standard for review:

> "Inasmuch as we cannot say with any degree of assurance that there would not have been a different result in the absence of the error... it must be regarded as prejudicial and the case remanded for a new trial." 361 P.2d at 415.

Not all references to other crimes, other than admission under Rule 55 of the Utah Rules of Evidence, are per se prejudicial. In State v. Hodges, 30 U.2d 367, 517 P.2d 1322 (1974) this Court held that where the trial judge sustains objections to such evidence, instructs the jury to disregard such evidence and minimizes the impact of the entire matter, a jury could be trusted to follow the trial court's instructions.

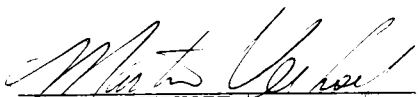
The record of defendant Gray's trial reflects no objection to evidence of prior misdeeds, convictions or

parole and does not reflect that the evidence was stricken. The jury was allowed to consider all the evidence without cautionary instructions. It is abundantly plain that such evidence had no probative value whatsoever. The only possible effect was one of degradation and indications of criminal propensity. Coupled with the dearth of direct and clear-cut evidence linking defendant to the crime the jury could easily have relied on the defendant's criminal history to adjudge him guilty. Not only was there a reasonable likekihood that the trial would have had a different result, in fact, the record reflects a strongly compelling likelihood of acquittal.

CONCLUSION

Appellant submits that the foregoing errors, each sufficient to justify reversal, combined to deprive him of a fair trial and due process of law. This Court should reverse and remand for a new trial.

Respectfully submitted.



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CERTIFICATE

I hereby certify that I delivered 2 copies

to the Office of the Attorney General, State Capital Building, Salt Lake City, Utah this 18th day of September, 1978.

MARTIN VERHOEF